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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. **588**

EDNA G. RANDALL, Administratrix of the Estate of Francis E. Randall, Deceased, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 16, 1960.

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v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on July 21, 1960.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals rendered on July 21, 1960, is reported at 282 F. 2d 287 and is reprinted as Appendix A hereto. The original opinion of the Court of Appeals, rendered on April 21, 1960, and vacated on May 10, 1960, is unreported, but is reprinted as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1960. A petition for rehearing *en banc* was denied on September 19, 1960. This petition for a writ of certiorari is filed less than ninety days after the denial of the rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 27 of the Federal Employees' Compensation Act, requiring that the United States be reimbursed for compensation payments out of any recovery from a tort-feasor where the death is caused "under circumstances creating a legal liability in some person other than the United States to pay damages therefor," is applicable where a judicial determination has been made that the United States is jointly responsible for the death.

2. Whether the United States, having been judicially found jointly responsible for the death of one of its employees, can escape completely its liability in the form of compensation payments through application of Section 27 of the Federal Employees' Compensation Act.

STATUTE INVOLVED

The relevant statute under which the United States is asserting its lien in this case is Section 27 of the United States Employees' Compensation Act, 5 U.S.C.A. § 777, which reads in pertinent part:

> "If an injury or death for which compensation is payable under this chapter is caused under circumstances creating a legal liability in some person other than the United States to pay damages

therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his own behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

"(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States . . . Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund."

* * * * * * * * *

Also involved is Section 201(b) of the Compensation Act, 5 U.S.C.A. § 757(b), making the provisions of the Act the exclusive remedy of federal employees and their beneficiaries against the United States:

"(b) The liability of the United States or any of its instrumentalities under sections 751-756, 757-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: . . ."

STATEMENT OF THE CASE

The facts of this case are not in dispute. On November 1, 1949, an Eastern Air Lines passenger plane collided in mid-air with a Bolivian military-type plane while approaching a runway at the Washington, D. C., National Airport. The Eastern plane was cut in two and all 55 passengers aboard were killed. Petitioner's husband, an employee of the Federal Government traveling in the course of his duties, was among those killed.

On October 26, 1950, petitioner, as administratrix of her husband's estate, filed this suit in the United States District Court for the District of Columbia against Eastern Air Lines, Inc., and others, claiming that the defendants negligently caused the death of her spouse. A stipulation was then filed in this case whereby the petitioner agreed to be bound on the question of the liability of the various defendants, including the United States, named in the so-called *Miller* cases in the District Court.[1] The *Miller* cases involved two other passengers, not employed by the Government, killed in the crash.

The *Miller* cases resulted in a final determination, binding in all the cases including the instant one grow-

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[1] In this case, Eastern Air Lines on October 6, 1953, filed a motion asking leave to add the United States as a third party defendant. This motion by stipulation was held in abeyance pending the outcome of the *Miller* cases and no formal action was ever taken upon it.

Petitioner, of course, was limited as against the United States to her claim under the Federal Employees' Compensation Act, which by its terms provides the exclusive remedy against the United States for injuries or deaths of federal employees. Section 201(b), 5 U.S.C.A. § 757(b).

ing out of the crash, that the United States and Eastern Air Lines were concurrently and equally responsible for the death of all the passengers on the plane. *Union Trust Co.* v. *United States*, 113 F. Supp. 80 (D.C.D.C.); *Eastern Air Lines* v. *Union Trust Co.*, 221 F. 2d 62 (App. D.C.); *United States* v. *Union Trust Co.*, 350 U.S. 907; *Eastern Air Lines* v. *Union Trust Co.*, 239 F. 2d 25 (App. D.C.), cert. denied, 353 U.S. 942.

Subsequently, Eastern Air Lines negotiated a settlement with the petitioner, as administratrix of her husband's estate, whereby Eastern was released of all causes of action by the petitioner growing out of the accident in consideration of the payment of $37,500 to petitioner. This settlement was approved by the District Court.

In the meantime, the petitioner, as the widow of her spouse, was receiving over a period of time the sum of $17,165.50 from the United States as compensation in accordance with the provisions of the Federal Employees' Compensation Act, 5 U.S.C.A. § 751, et seq. These payments ceased upon petitioner's remarriage, as provided by the Act, 5 U.S.C.A. § 760 (A).

The sum of $37,500, the settlement figure approved by the District Court, was paid into that court's registry by Eastern Air Lines following notification that the United States was asserting a lien on $17,165.50 of that sum. This lien claim was based on the provision of Section 27 of the Federal Employees' Compensation Act, 5 U.S.C.A. § 777, to the effect that the United States may obtain a refund of any compensation paid to a beneficiary under the Act where the injury or death "is caused under circumstances creating a legal lia-

bility in some person other than the United States to pay damages therefor" and where the said beneficiary receives any money or property in satisfaction of the liability of such other person.

The District Court, with the consent of all parties concerned, then directed that all but $17,165.50 of the $37,500 on deposit be disbursed to petitioner and her then attorneys. The United States having petitioned to enforce its lien and the petitioner having filed a formal claim to the $17,165.50, cross motions for summary judgment were filed. The District Court thereafter granted judgment for the United States. This appeal followed, the payment of the $17,165.50 having been stayed pending the outcome of the appeal.

On April 21, 1960, following oral argument before it, the Court of Appeals unanimously reversed the judgment of the District Court and held that summary judgment should have been awarded to petitioner. The Court ruled that the United States was not entitled to recoupment of the $17,165.50 since the compensation in that amount had been paid to the widow while the $37,500 tort recovery was by the administratrix, it being improper to recoup payments to the widow from payments to the administratrix even where the widow and administratrix are one and the same person. See Appendix B hereto, pp. 13a-19a, *infra*.

But on May 10, 1960, the Court of Appeals ordered, *sua sponte*, "that the opinion and judgment of this Court entered herein April 21, 1960 are vacated." No reason was given for this action and no opportunity was afforded the parties to present further arguments in support of or in opposition to the April 21 opinion.

Then on July 21, 1960, by a 2-1 vote, the Court of Appeals without reference to its prior actions reversed itself and held that the United States was entitled to a statutory refund to the extent that the refund does not exceed the widow's share of the tort recovery from Eastern Air Lines. Judge Wilber K. Miller filed a dissenting opinion. Finally, on September 19, 1960, a petition for rehearing *en banc* was denied, Judge Miller noting that he "would grant the petition."

REASONS FOR GRANTING THE WRIT

This case involves an important and novel issue arising under the Federal Employees' Compensation Act. And the resolution of that issue by the court below creates an unwarranted and discriminatory hardship on beneficiaries of federal employees killed by reason of the joint negligence of the United States and a third party.

1. Never before has it been necessary to determine what effect the judicially determined negligence of the United States has upon its right to recoup compensation payments under the Federal Employees' Compensation Act out of the proceeds of a tort recovery from a joint tort-feasor. This problem is of obvious importance in the administration and application of the Compensation Act. As the manifold activities of the Federal Government continue to expand, the chances of its negligence playing a part in the death or injury of its employees traveling on official duty necessarily increase. And the problem thus becomes one of continuing and perhaps growing importance.

2. The difficulties implicit in resolving this issue are made clear by the sharp division of opinion within

the Court of Appeals. The rather summary ruling of the majority that it is immaterial to the application of Section 27 of the Compensation Act that the negligence of the Government was one cause of the fatal accident has been countered by a detailed and comprehensive analysis in the dissenting opinion that compels the precisely opposite conclusion. Even more dramatic was the action of the Court of Appeals in first announcing a unanimous decision in petitioner's favor and then withdrawing that opinion, thereby indicating the intrinsic importance and uncertainty posed by the issue at stake. Only this Court can definitively resolve this knotty problem.

3. In holding that the Government's judicially determined negligence is immaterial to the application of Section 27 of the Compensation Act, the court below has misconstrued and misapplied the Act with the result that an unwarranted and discriminatory hardship has been imposed on beneficiaries of federal employees killed in the line of duty.

(a) The whole thrust of the Compensation Act is to provide compensation to federal employees and their beneficiaries for injuries or deaths without regard to the question of negligence on the part of the Government. But Section 27 of the Act provides for recoupment by the Government of such compensation payments only where the injury or death was "caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor". The sparse legislative history of Section 27 indicates that Congress was here thinking of recoupment only in terms of a situation where the Government was not in any way at fault or where the ques-

tion as to the Government's negligence remained unresolved.[2] Nowhere was there any real indication that the legislative authors even contemplated, much less intended, that Section 27 might be applied to compel the return of compensation payments where there had been a judicial determination that the Government was wholly or partly at fault. And this Court, in *Dahn* v. *Davis*, 258 U.S. 421, 430, referred to Section 27 only in terms of situations involving the liability of persons "other than the United States."

(b) The statutory interpretation adopted by the court below leads to an incongruous and illogical result. If the United States alone were guilty of negligence, it obviously would have to bear the full burden of its compensation payments and Section 27 would not apply. But where, as here, a third party is jointly negligent with the United States, the theory of the court below would permit the United States to free itself of all financial responsibility and shift the entire burden to the third party. The United States is in effect made whole for the financial burden (in the form of compensation payments) put upon it by reason of its own

[2] See the definitive legislative report (H. Rep. No. 677, 64th Cong., 1st Sess., pp. 11-12, 1916) dealing with Section 27, where the legislative draftsmen spoke of the applicability of that provision where "the injury or death for which compensation is payable is caused by the negligence of some person other than the United States". And in the hearings leading to the issuance of that report, a prominent spokesman who apparently participated in drafting Section 27 emphasized that it was only fair to compel a return of compensation paid by the Government where recovery was had from a third party since the employee "is receiving compensation where the United States has been guilty of no fault at all". Hearings on Federal Employees Compensation, Committee on the Judiciary, H.R., 63rd Cong., 2d Sess., Serial 16—Part 2, pp. 62-64.

negligence. Such an inequitable result ought not to result without an explicit legislative direction to that effect.

(c) The underlying rationale of Section 27, and the one advanced by the Government in the courts below, is that the employee or his beneficiary should not be allowed to retain a double recovery for the same tort. See *Lewis* v. *United States*, 190 F. 2d 22 (App. D.C.). But that exemplary principle is not germane in the instant situation, thereby further demonstrating the inapplicability of Section 27.

By reason of its part in causing the fatal accident, the United States made compensation payments to the *widow* of the decedent in order, as the legislators have put it, "to meet ordinary living expenses under prevailing economic conditions" and to help foreclose "the necessity of seeking charity or reliance upon the help of friends". S. Rep. 836, 81st Cong., 2d Sess., 2 U.S. Code Cong. Serv. Leg. Hist. 2125 (1949). In other words, the United States here paid the widow $17,165.50 so that she would not become a public or private charge. Such payments had no relationship to any permanent loss she or the next of kin may have suffered; and they abruptly ceased upon her death or remarriage.

On the other hand, the tort recovery against Eastern was premised on something entirely different than a desire to give the widow enough to live on until she remarried or died. It was a recovery by the *administratrix* on behalf of the widow and any other next of kin who might have survived and was not limited by the extent of ordinary living expenses or by any mere

desire to preclude reliance on charity or friends." The damages, by terms of the relevant statute (16 D.C. Code § 1201), were determined with reference to the permanent or lifetime injury to the spouse and next of kin as of the time of death. *Tate* v. *Nelson*, 71 F. Supp. 465 (D.C. D.C.); *Southern Ry. Co.* v. *Hawkins*, 35 App. D.C. 313; *Rankin* v. *Shagna Brothers, Inc.*, 234 F. 2d 35 (App. D.C.); *Coleman* v. *Moore*, 108 F. Supp. 425, 427 (D.C. D.C.).

Here the United States has neither alleged nor proved that the $37,500 settlement with Eastern represented any part of the factors entering into the determination of the compensation payments by the United States.[3] And in the absence of such identity of factors, there cannot be any double recovery justifying recoupment of the $17,165.50 by the United States. Thus this Court's decision in *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, relied upon by the court below, is readily distinguishable; there the Court carefully noted (p. 412) that the tort verdict, "includes sums for past loss of wages and medical expenses which it is argued were the very items on account of which Hawn's employer paid him" compensation. The double recovery involved in *Hawn* is completely absent here.

(d) As pointed out by the dissenting opinion of Judge Miller, it is not to be supposed that Congress, by making the Compensation Act the exclusive remedy against the Government for injuries and deaths of

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[3] Indeed, it is reasonable to assume that the $37,500 settlement represented the damages Eastern Air Lines felt were properly owing after giving due allowance for the $17,165.50 already received by petitioner as widow from the United States.

federal employees, intended to discriminate against such employees and their beneficiaries where the Government was partly at fault. Yet the result below creates precisely that discrimination. See pp. 10a-11a, *infra*.

Before the Tort Claims Act was passed in 1946, 28 U.S.C. §§ 1346, 2671-2678, 2680, the federal employee or his beneficiary had no alternative but to pursue compensation claims under the Compensation Act. When the Tort Claims Act came into existence, such a person for the first time had the alternative of suing the United States, as well as the third party tort-feasor, for damages. But by amending the Compensation Act in 1949 to make it the exclusive remedy for the federal employee or his beneficiary where the Government is negligent, Congress in effect withdrew the Tort Claims Act remedy and confined the Government's tort liability to compensation payments under the Compensation Act. Section 201(b), 5 U.S.C.A. § 757(b). In effect, the equality created in 1946 was continued in 1949; the tort liability of the Government was simply confined to the Compensation Act.

The result below, however, involves an inequitable assumption that the Compensation Act, despite the 1949 amendment, can be applied so as to exclude completely such tort liability and such payments. Federal employees and their beneficiaries, having been placed in a status of equality in 1946 with non-Government employees and their beneficiaries, are now told by the court below that they must forego all hope of obtaining any tort recovery against the Government despite its admitted negligence and must disgorge any compensation payments received in satisfaction of that tort liability wherever and whenever a recovery is had from

the joint tort-feasor. No mandate from Congress compels that discriminatory result.

Nor does anything in *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, so apparently crucial to the Government's position, compel that result. That case involved Section 33 of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 933, which creates considerations differing from those arising from Section 27 and Section 201(b) of the Compensation Act. Section 27 of the latter Act must be read and applied against the legislative background of changing legal rights resulting from the passage of the Tort Claims Act and of Section 201(b) of the Compensation Act. And *Pope & Talbot* was decided without reference to the facts and the contentions brought to bear by petitioner in this case.

In brief, the Government's "hands ought not to have the blood of the dead or injured workman upon them, when . . . [it] thus invokes the impartial powers and processes of law" to assert the lien given it by Section 27. See *Brown* v. *Southern R. Co.*, 204 N.C. 668, 169 S.E. 419. When the Government has been found negligent, by virtue of a binding judicial determination, only the clearest legislative language should justify stripping the beneficiary of a deceased federal employee of his right to keep the payments received in recognition of the Government's tort liability. No such language is apparent.

CONCLUSION

The decision below is not only important, novel and unsupported by statutory language or history but is contrary to the liberal and humanitarian spirit which should pervade the interpretation of workmen's compensation laws. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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December 16, 1960.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,227

EDNA G. RANDALL, Administratrix of the estate of Francis E. Randall, deceased, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided July 21, 1960

Mr. Eugene Gressman, with whom *Mr. Hyman Smollar* was on the brief, for appellant.

Mr. Anthony L. Mondello, Attorney, Department of Justice, of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Assistant Attorney General Doub*, and *Messrs. Oliver Gasch*, United States Attorney, and *Morton Hollander*, Attorney, Department of Justice, were on the brief, for appellee.

Before EDGERTON, WILBUR K. MILLER, and FAHY, *Circuit Judges*.

EDGERTON, *Circuit Judge*: Francis E. Randall, a government employee traveling on government business, was killed in an airplane accident due to the negligence of a pilot employed by Eastern Air Lines and of a control tower operator employed by the United States. As her husband's executrix, his widow sued Eastern and agreed to a $37,500 settlement. Eastern paid the money into

court, because the United States asserted a lien for the amount it had paid the widow as compensation under the Federal Employees' Compensation Act. The District Court sustained the claim of the United States, and the widow appeals.

Section 27 of the Compensation Act, 39 STAT. 747-748, 5 U.S.C. § 777, provides that "if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner: (A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States . . . ."

It is not disputed that Randall's death was "caused under circumstances creating a legal liability in" Eastern. In our opinion the suit of the administratrix against Eastern was brought, and her settlement with Eastern was made, either wholly or partly on "behalf" of Randall's widow. The wrongful death statute of the District of Columbia forbids "payment of the debts or liabilities" of the deceased out of money recovered by an administrator because of a wrongful death. D.C.Code § 16-1203. The entire amount recovered is to be allocated "to the spouse and next of kin . . . according to the finding of damage to said spouse and next of kin." D.C.Code § 16-1201. In the absence of such a finding, the widow and the next of kin, if any, are to share in the amount accord-

ing to the statute of distribution. D.C.Code § 16-1203; see §§ 18-702 to 18-704.

It follows that the United States is entitled to the statutory refund, but only to the extent that it does not exceed the widow's share of Eastern's payment. We think it immaterial that a government employee's negligence was one cause of Randall's death. We find nothing in § 27 of the Compensation Act to suggest that when the negligence of one government employee causes an accident to another government employee for which the United States pays compensation, the beneficiary is excused from refunding the compensation to the United States out of money the beneficiary receives "in satisfaction of the liability of [an]other person." In *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 411-412, the Supreme Court upheld the right of a negligent private employer, in similar circumstances, to a refund of compensation that had been paid under the Longshoremen's and Harbor Workers' Compensation Act, 44 STAT. 1424, 33 U.S.C. § 901. There are cases to the same effect under similar State compensation acts; *e.g.*, *Cyr* v. *F. S. Payne Co.*, 112 F. Supp. 526, 530-531 (D.C., Conn.). These acts are not intended to allow a beneficiary what amounts to a double recovery on account of the injury or death of an employee, in order to punish his employer for the negligence of another employee.

The judgment is vacated and the case is remanded for further proceedings consistent with this opinion.

Vacated and remanded.

WILBUR K. MILLER, *Circuit Judge*, dissenting: In order to set forth my theory of this case, it is necessary to make a more detailed statement of the situation, both as to law and to facts, than does the majority opinion.

When an Eastern Air Lines passenger plane was about to land at the Washington National Airport on the morn-

ing of November 1, 1949, it was struck and cut in two by a Bolivian military-type plane, and the 55 persons on board it were killed.[1] Among them was Francis E. Randall, an employee of the United States Government who was traveling on official business. He was childless and was survived by his widow, Edna G. Randall.

Generally, under the Federal Tort Claims Act,[2] the United States is legally liable to pay damages for injury to or the death of any person caused by its sole or concurring negligence. But if the decedent was a Government employee, the Tort Claims Act does not apply and the United States is not legally liable in damages. This is so because the Government's only liability for the injury or death is under the Federal Employees' Compensation Act, 5 U.S.C. § 760, 30 STAT. 744: to pay compensation at stipulated rates, first to the decedent's childless widow, and then in succession to persons of varying degrees of relationship.[3]

Because of this statutory situation, the administratrix of the estate of Francis E. Randall did not follow the

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[1] The Bolivian plane was occupied only by its pilot, who survived.

[2] 60 STAT. 842 (Aug. 2, 1946). See also 28 U. S. C. § 1346.

[3] A compensation claim was made the exclusive remedy by Section 201(b), Federal Employees' Compensation Act Amendments of 1949, 63 STAT. 861, 5 U. S. C. § 757(b):

> "The liability of the United States or any of its instrumentalities under this Act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however*, That this subsection shall not apply to a master or a member of the crew of any vessel."

example set by most of the personal representatives of the victims who filed suit in the United States District Court for the District of Columbia against Eastern Air Lines, alleging negligence in the operation of its plane, and against the United States, alleging negligence on the part of its tower operators. Randall's administratrix sued Eastern Air Lines only, and did not complain against the United States because, as we have seen, the Government is not liable in damages under the Federal Tort Claims Act or otherwise for the death of its employee during the performance of his duty, even though the death was caused by the negligence of the United States.

From the many suits filed as a result of the accident, four cases were selected to be tried to determine liability,[4] and it was stipulated in all other actions that they should be governed as to liability by the final result of those chosen to be tried. Among the cases included in the stipulation was that presently before us, which had been filed October 26, 1950, by Edna G. Randall, Administratrix of the Estate of Francis E. Randall, against Eastern Air Lines.

The test cases resulted in a final determination that Eastern Air Lines and the United States were negligent and, therefore, liable in damages for the deaths of the persons on the Eastern plane. *Union Trust Co.* v. *United States*, 113 F. Supp. 80 (D.D.C. 1953); *Eastern Air Lines* v. *Union Trust Co.*, 95 U.S. App. D. C. 189, 221 F. (2d) 62 (1955); *United States* v. *Union Trust Co.*, 350 U.S. 907 (1955); *Eastern Air Lines* v. *Union Trust Co.*, 99 U. S. App. D. C. 205, 239 F. (2d) 25 (1956), *cert. denied* 353 U.S. 942 (1957). After the final determination of its liability, Eastern Air Lines negotiated a settlement with Randall's administratrix for the sum of $37,500, which was approved by the District Court.

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[4] And other questions not pertinent here.

Soon after the fatal accident, Randall's widow had filed a claim for compensation on account of his death with the United States Employees' Compensation Commission. An award was entered May 8, 1950, giving the widow monthly compensation of $292.50 from November 3, 1949,[5] until her death or marriage. When she remarried August 31, 1954, she had received compensation in the aggregate sum of $17,165.50

Having paid the widow compensation in that sum on account of Randall's death, the United States claimed it was entitled to be reimbursed therefor out of the sum of $37,500 which Eastern Air Lines had agreed to pay to the administratrix in settlement of her suit against it, and was entitled to a lien thereon. The Government's contention was based on Section 27 of the Federal Employees' Compensation Act, 5 U.S.C. § 777, 39 STAT. 747 (Sept. 7, 1916), which is reproduced in the margin.[6] Be-

[5] The first three days are excluded by the statute.

[6] "Sec. 27. That if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

"(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

"(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payment payable to him by the United States, on account of the same injury."

cause the Government was claiming a lien upon the sum it had agreed to pay to the administratrix, Eastern Air Lines prayed for and obtained permission to pay the sum of $37,500 into the registry of the District Court to await disposition of the Government's claim. Therefore, the Government filed, in the proceeding by the administratrix against Eastern Air Lines, a petition to enforce its alleged lien; it averred that the "Plaintiff, Edna G. Randall, Administratrix of the estate of Francis E. Randall, deceased, received the sum of $17,165.50 under the provisions of the Federal Employees Compensation Act as the widow of Francis E. Randall . . . ."

After answer by the administratrix, the question was submitted on cross-motions for summary judgment. The District Court granted the motion of the Government and directed that, of the money deposited in the registry of the court, the sum of $17,165.50 be paid to the Government. The court stayed the execution of its order pending this appeal by the administratrix, which immediately followed.

As has been said, it has been judicially determined that Randall's death was caused by the concurrent negligence of Eastern Air Lines and the United States. If he had not been a Government employee, both tort-feasors would have been legally liable to pay damages. But, as he was a Government employee, only Eastern is legally liable to pay damages, and compensation must be paid by the United States. Because of the apparent compulsion of Section 27 of the Compensation Act,[7] the District Court has held that the damages paid by Eastern must be diminished by the repayment of the federally-paid compensation. The net result of the holding is that, merely because Randall was a Government employee, only Eastern pays damages and the United States pays nothing—it pays neither damages nor compensation, although it was

[7] See footnote 6.

concurrently negligent. Whether the District Court was correct in so ruling is the question presented by this appeal.

The right to exoneration from payment of compensation, which the United States claims here, depends entirely upon Section 27 of the Compensation Act; it cannot be derived from the law of torts. The literal language of Section 27 does indeed provide "That if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor," and if a compensation payee collects such damages, he shall refund therefrom the compensation paid by the United States. Its language must be construed, however, in the light of its background and subsequent legislative enactments.

In 1916, when Section 27 of the Compensation Act was written, the United States was not subject to tort liability and, therefore, was not legally liable to pay damages for the injury or death of an employee caused by its sole or concurrent negligence; payment of compensation for such injury or death was provided for as a matter of grace only. It seems clear to me that in writing Section 27, Congress did not foresee the passage of the Federal Tort Claims Act, and did not anticipate that there might be, as there is here, a binding judicial determination that the Government had been negligent. Had it anticipated such a situation, Congress surely would not have intended to say that in such event the United States should not only not be liable in damages but should even be excused from the payment of compensation. That would have been putting a premium on negligence, instead of a penalty.

The word "negligence" is not used in Section 27, which speaks only of "legal liability" to pay damages. The difference is significant. It shows, I think, that in adopting the Compensation Act, Congress clung to the doctrine

of Sovereign immunity: it provided that compensation paid as a matter of grace because of the injury or death of an employee must be repaid to it out of damages collected from one who was "legally liable" therefor.

This continued to be the policy of Congress until 1946, when for the first time it provided for a general relaxation of the doctrine of sovereign immunity by the passage of the Federal Tort Claims Act. That made it possible, without special permission, to sue the United States in tort. Thereafter the Government was "legally liable" to pay damages for the injury or death of an employee caused by its sole or concurrent negligence, because the payment of compensation had not then been made the exclusive remedy against the Government for the injury or death of an employee.[8]

After the Tort Claims enactment, in cases where, as here, the United States and another had been concurrently negligent in causing the injury or death of a government employee, there was a choice of remedies: 1. a compensation claim against the United States and a suit for damages against the private tort-feasor; 2. suits for damages against the United States and the private tort-feasor.

Three years after the passage of the Tort Claims Act, and doubtless because of the situation I have just described, Congress amended the Compensation Act by adding thereto what is now Section 201(b),[9] which provides the liability of the United States under the Compensation Act with respect to the injury or death of an employee shall be exclusive.

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[8] Before the passage of the Tort Claims Act there was no occasion to provide in express terms that a compensation claim should be the exclusive remedy against the United States for negligently killing or injuring an employee, because there was no other remedy.

[9] See footnote 3.

As has been said, a compensation claim was already the only remedy against the Government for injury or death of an employee *not* caused by its negligence. So, Section 201(b) could only have been intended to withdraw the coverage of the Tort Claims Act in cases where a Government employee had been injured or killed because of the negligence of the United States, and to provide that in such cases of Government negligence the remedy should be compensation instead of damages.

Having adopted the Tort Claims Act and given general permission to sue the United States for its torts, it is not to be supposed that Congress intended to discriminate against Government employees by withdrawing the Act's coverage as to them without providing a reasonably adequate substitute for the tort liability so withdrawn. I would hold, therefore, that the legislative intent in adopting Section 201(b) was to provide that in cases of Government negligence compensation was not being awarded as an act of grace, but in recognition of governmental responsibility. Hence the award of compensation was not to be defeated and repaid to the Government merely because damages had been paid by a private tort-feasor who had been concurrently negligent.

This means, of course, that Section 201(b) had the effect of making Section 27 inapplicable to cases in which the negligence of the United States had concurred with that of a private tort-feasor. Otherwise, the result would be that in cases like this one, the compensation paid by the Government in lieu of damages for its negligence must be repaid to it from damages collected from another who was concurrently negligent. Such an incongruous result would be contrary to the spirit of the Tort Claims Act, and of Section 201(b) which I think was intended to replace it, with respect to Government employees, with a provision for non-defeasible compensation.

Because of Section 201(b), the United States is again not "legally liable" for the injury or death of an employee caused by its negligence, but is legal liability to pay compensation therefor has been made absolute by that Section, not subject to repayment from damages collected from another who was concurrently negligent. Accordingly, I would hold Section 27 should now be construed as though it read:

> "That if an injury or death for which compensation is payable under this Act is caused by the sole negligence of some person other than the United States . . . compensation received must be repaid out of damages collected."

A literal interpretation of the section would lead to this inequitable result: the United States would be required to pay compensation for the death of an employee caused by its sole negligence, but would not be required to pay it if its negligence had concurred with that of another. I am unwilling to believe Congress so intended.

Under my view of the case, it might be suggested that the sum now in the registry of the District Court should be paid back to Eastern as a credit on the damages paid by it, that is, by way of contribution from the Government. Or it might be suggested that the sum held by the District Court should go to Mrs. Randall. I am not concerned with the ultimate disposition of the money except that I am convinced the United States is not entitled to it.

I do not believe the *Pope & Talbot* case[1] is applicable here. It involved the Longshoremen's and Harbor Worker's Act, 44 STAT. 1424, 33 U.S.C. § 901 *et seq.*—not the Federal Employees' Compensation Act. Section 33 of the former (33 U.S.C. § 933) differs from Section 27 of the latter. The *Pope & Talbot* opinion did not consider the

[1] 346 U.S. 406 (1953).

question I am suggesting that, because of subsequent legislation and changed legal relations caused thereby, Section 27 no longer has the meaning it had originally. Moreover, I note the Supreme Court said in *Pope & Talbot* case, at page 411, "Hawn has agreed to refund these [compensation] payments to his employer out of his Pope & Talbot recovery." In this case, Mrs. Randall made no such agreement, nor was it required by the statute.

I would hold the United States is not entitled to repayment of the compensation which it had paid to Mrs. Randall in lieu of damages for its negligence in causing her husband's death, and of course is not entitled to a lien on the damages paid by Eastern Air Lines.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, vacated and that this case is remanded to the District Court for further proceedings consistent with the opinion of this court.

Per Circuit Judge Edgerton.

Dated: July 21, 1960.

Separate dissenting opinion by Circuit Judge Wilbur K. Miller.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,227

EDNA G. RANDALL, Administratrix of the estate of Francis E. Randall, deceased, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided April 21, 1960

Mr. Eugene Gressman, with whom *Mr. Hyman Smollar* was on the brief, for appellant.

Mr. Anthony L. Mondello, Attorney, Department of Justice, of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Assistant Attorney General Doub*, and *Messrs. Oliver Gasch*, United States Attorney, and *Morton Hollander*, Attorney, Department of Justice, were on the brief, for appellee.

Before EDGERTON, WILBUR K. MILLER, and FAHY, *Circuit Judges*.

WILBUR K. MILLER, *Circuit Judge*: When an Eastern Air Lines passenger plane was about to land at the Washington National Airport on the morning of November 1, 1949, it was struck and cut in two by a Bolivian military-

type plane, and the 55 persons on board it were killed.[1] Among them was Francis E. Randall, an employee of the United States Government who was travelling on official business. He was childless and was survived by his widow, Edna G. Randall.

Generally, under the Federal Tort Claims Act, the United States is liable in damages to the personal representative of a decedent whose death was caused by negligence. But if the decedent was a Government employee whose death occurred during the performance of his duty, the United States is not liable in damages to his personal representative. In such a case, the Government's only liability is under the Federal Employees' Compensation Act, 5 U.S.C. § 760, 39 STAT. 744: to pay compensation at stipulated rates, first to the decedent's childless widow, and then in succession to persons of varying degrees of relationship; there is no provision for the payment of compensation to the decedent's personal representative.

Because of this statutory situation, the administratrix of the estate of Francis E. Randall did not follow the example set by most of the personal representatives of the victims who filed suit in the United States District Court for the District of Columbia against Eastern Air Lines, alleging negligence in the operation of its plane, and against the United States, alleging negligence on the part of its tower operators. Randall's administratrix sued Eastern Air Lines only, and did not complain against the United States because, as we have seen, the Government is not liable in damages under the Federal Tort Claims Act or otherwise for the death of its employee during the performance of his duty, even though the death was caused by the negligence of the United States.

From the many suits filed as a result of the accident, four cases were selected to be tried to determine liability,[2]

[1] The Bolivian plane was occupied only by its pilot, who survived.

[2] And other questions not pertinent here.

and it was stipulated in all other actions that they should be governed as to liability by the final result of those chosen to be tried. Among the cases included in the stipulation was that presently before us, which had been filed October 26, 1950, by Edna G. Randall, Administratrix of the Estate of Francis E. Randall, against Eastern Air Lines.

The test cases resulted in a final determination that Eastern Air Lines and the United States were liable in damages for the deaths of the persons on the Eastern plane. *Union Trust Co.* v. *United States*, 113 F. Supp. 80 (D. D. C. 1953); *Eastern Air Lines* v. *Union Trust Co.*, 95 U. S. App. D. C. 189, 221 F. (2d) 62 (1955); *United States* v. *Union Trust Co.*, 350 U. S. 907 (1955); *Eastern Air Lines* v. *Union Trust Co.*, 99 U. S. App. D. C. 205, 239 F. (2d) 25 (1956), *cert. denied* 353 U. S. 942 (1957). After the final determination of its liability, Eastern Air Lines negotiated a settlement with Randall's administratrix for the sum of $37,500, which was approved by the District Court.

Soon after the fatal accident, Randall's widow had filed a claim for compensation on account of his death with the United States Employees' Compensation Commission. An award was entered May 8, 1950, giving the widow monthly compensation of $292.50 from November 3, 1949,[3] until her death or marriage. When she remarried August 31, 1954, she had received compensation in the aggregate sum of $17,165.50.

Having paid the widow compensation in that sum on account of Randall's death, the United States claimed it was entitled to be reimbursed therefor out of the sum of $37,500 which Eastern Air Lines had agreed to pay to the administratrix in settlement of her suit against it, and was entitled to a lien thereon. Because the Government was claiming a lien upon the sum it had agreed to pay to

[3] The first three days are excluded by the statute.

the administratrix, Eastern Air Lines prayed for and obtained permission to pay the sum of $37,500 into the registry of the District Court to await disposition of the Government's claim. Therefore, the Government filed, in the proceeding by the administratrix against Eastern Air Lines a petition to enforce its alleged lien; it averred that the "Plaintiff, Edna G. Randall, *Administratrix of the estate of Francis E. Randall, deceased*, received the sum of $17,165.50 under the provisions of the Federal Employees Compensation Act *as the widow of Francis E. Randall*. . . ." (Emphasis supplied.)

After answer by the administratrix, the question was submitted on cross-motions for summary judgment. The District Court granted the motion of the Government and directed that, of the money deposited in the registry of the court, the sum of $17,165.50 be paid to the Government. The Court stayed the execution of its order pending this appeal by the administratrix, which immediately followed.

Seizing on the fortuitous circumstance that Mrs. Randall was the widow and also the administratrix, the Government claims it is entitled to reimbursement from the damages paid the administratrix by Eastern for the compensation it paid the widow, because of Section 27 of the Federal Employees' Compensation Act, 5 U. S. C. § 777, 39 STAT. 747. That statutory provision and the related Section 26, 5 U. S. C. § 776, 39 STAT. 747, 64 STAT. 1271, are reproduced in the margin.[4]

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[4] "SEC. 26. If an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the Secretary may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the Secretary

In our view, that flaw in the Government's position is that the widow, who personally received compensation from the United States, had no right of action against Eastern, and the suit against Eastern was not brought on her behalf. It was brought by a fiduciary—the administratrix—on behalf of Randall's estate. The coincidence

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may require said beneficiary to prosecute said action in his own name.

"If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the Secretary, he shall not be entitled to any compensation under this Act.

"The cause of action when assigned to the United States may be prosecuted or compromised by the Secretary, and if the Secretary realizes upon such cause of action, he shall apply the money or other property so received in the following manner: After deducting the amount of any compensation already paid to the beneficiary and the expenses of such realization or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury.

"Sec. 27. That if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

"(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

"(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States, on account of the same injury."

that both the widow and the fiduciary were Edna G. Randall confers no right on the United States. The Government is no more entitled to recover from the fiduciary the compensation which it paid the widow than it would be if the fiduciary happened to be a trust company.

In preparing its petition to enforce its alleged lien, the Government apparently recognized this difficulty and attempted to evade it by alleging that the plaintiff *administratrix* received compensation of $17,165.50 "*as the widow of Francis E. Randall.*" (Emphasis supplied.) Standing alone, this allegation is manifestly incorrect, as the statute does not authorize the payment of compensation to a personal representative. But the allegation does not stand alone; for exhibits attached to the Government's petition, consisting of documents from the files of the Compensation Board, show that the claim for compensation was asserted by "Edna G. Randall, an unremarried widow," that the award and payments were made to her and not to the administratrix. Thus the exhibits attached to the petition of the United States contradict its averment that the administratrix received the payments of compensation.

When there is a disparity between the allegations of a pleading and an exhibit attached to it, the exhibit will control. 2 BARRON AND HOLTZOFF § 325 (1950); *Simmons* v. *Peavy-Welsh Lumber Co.*, 113 F. (2d) 812 (5th Cir. 1940). From this it follows that the Government's allegation, as controlled by its exhibits, really was that the administratrix did *not* receive compensation as the widow. With the allegation so read, the Government's petition to enforce its alleged lien was vulnerable when attacked by a motion to dismiss or for summary judgment.

Moreover, as has already been suggested, the administratrix could not have claimed or been awarded compensation, which is an allowance to the widow or next of kin, according to the statute. Only funeral and burial expenses, not in excess of $400, may be paid to the personal representative. 5 U. S. C. § 761.

If, after Randall's debts are paid, his widow personally becomes entitled either to part or all of the remainder of his estate, it will still be true that she never had a claim against Eastern. As we have said, the fiduciary suit against Eastern was not brought on her behalf, and the reimbursement provisions on which the United States relies therefore have no application. Accordingly, the Government had no lien on the money paid into the registry by Eastern Air Lines; its petition to enforce its supposed lien should have been denied, and the motion of the administratrix for summary judgment should have been granted.

Reversed and remanded for proceedings consistent with this opinion.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court.

PER CURIAM.

Dated: April 21, 1960.

Order

It is ORDERED by the court, sua sponte, that the opinion and judgment of this court entered herein April 21, 1960 are vacated.

PER CURIAM.

Dated: May 10, 1960.

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No. 588

In the Supreme Court of the United States

OCTOBER TERM, 1960

EDNA G. RANDALL, ADMINISTRATRIX OF THE ESTATE OF FRANCIS E. RANDALL, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEO. S. LEONARD,
Acting Assistant Attorney General,
MORTON HOLLANDER,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 588

EDNA G. RANDALL, ADMINISTRATRIX OF THE ESTATE OF FRANCIS E. RANDALL, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was written by the district court. The opinion of the court of appeals is reported at 282 F. 2d 287, and appears as Appendix A (pp. 1a–12a) to the petition for certiorari. An earlier opinion, withdrawn by the court *sua sponte*, appears as Appendix B (pp. 13a–19a).

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1960 (Pet. 12a). A petition for rehearing *en banc* was denied on September 19, 1960. The

petition for a writ of certiorari was filed on December 16, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether both courts below were correct in refusing to write into Section 27 of the Federal Employees' Compensation Act—which provides that a beneficiary who receives workmen's compensation benefits under the Act from the United States and also receives an additional award or settlement for the same accident from a third-party tortfeasor "shall refund to the United States the amount of compensation which has been paid by the United States"—the limitation that the obligation to refund arises only in those situations in which the third-party tortfeasor was exclusively or solely liable for the accident.

STATUTES INVOLVED

Section 201(b), Federal Employees' Compensation Act, as amended, 63 Stat. 861, 5 U.S.C. 757(b):

> The liability of the United States or any of its instrumentalities under this Act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under

any Federal tort liability statute: *Provided, however,* That this subsection shall not apply to a master or a member of the crew of any vessel.

Section 26, Federal Employees' Compensation Act, 39 Stat. 747, as amended, 5 U.S.C. 776:

If an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the Secretary may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the Secretary may require said beneficiary to prosecute said action in his own name.

If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the Secretary, he shall not be entitled to any compensation under this Act.

The cause of action when assigned to the United States may be prosecuted or compromised by the Secretary; and if the Secretary realizes upon such cause of action, he shall apply the money or other property so received in the following manner: After deducting the amount of any compensation already paid to the beneficiary and the expense of such realization or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future pay-

ments of compensation payable to him on account of the same injury.

Section 27, Federal Employees' Compensation Act, 39 Stat. 748, 5 U.S.C. 777:

> If an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:
>
> (A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.
>
> (B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States, on account of the same injury.

STATEMENT

Petitioner is the former widow of Francis E. Randall, a federal employee, whose death occurred when he was a passenger on an airplane owned by Eastern Air Lines, Inc. (Eastern), which, in 1949, collided with a Bolivian fighter plane while both planes were attempting to land at the Washington National Airport. The present proceeding arises out of the wrongful death action petitioner filed in the District Court for the District of Columbia against Eastern and other individuals. The United States was not named as a defendant; petitioner's complaint did not raise the question of any negligence on the part of the United States;[1] nor was there any judicial determination of negligence on the part of the United States in the present case.[2]

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[1] The complaint has not been reprinted, but appears in the original record in the case.

[2] During the litigation, Eastern moved, on October 6, 1953, for leave to implead the United States as a third-party defendant, and attached its proposed third-party complaint. Neither the motion nor the third-party complaint was reprinted, but they appear in the original record. In that complaint, Eastern asserted that the accident was caused by the negligence of the Government control tower operators at the airport, and claimed indemnity or contribution from the United States. Petitioner filed an opposition to the motion on October 12, 1953; by stipulation filed on March 19, 1954, the motion was held in abeyance pending the outcome of other litigation brought in the district court by executors of two other passengers killed in the same accident (the *Miller* cases where the Government was adjudicated as negligent with respect to non-employees). Neither petitioner's opposition to the motion nor the related stipulation has been reprinted, but they also appear in the original record. No ruling has ever been entered with respect to the motion to implead the United States.

Petitioner's suit against Eastern was ultimately settled for $37,500 (J.A. 2, 6, 20).[3] Prior to payment of this amount, the United States advised Eastern's counsel that it claimed a lien in the sum of $17,165.50, which had been paid to petitioner as compensation under the Federal Employees' Compensation Act (J.A. 5). Eastern then filed a petition for authority to pay the $37,500 into the registry of the court (J.A. 2–3), on the ground that it could not safely pay the amount of the settlement to anyone.

Petitioner, in its answer, opposed Eastern's petition, (J.A. 6–7), as well as the Government's petition to enforce its lien (J.A. 8, 21), by which the United States for the first time became a party to these proceedings.

Both petitioner and the United States then moved for summary judgment (J.A. 23). The district court denied petitioner's motion and granted that of the United States, ordering payment to the United States of the sum of $17,165.50 (J.A. 24).[4]

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[3] "J.A." refers to the Joint Appendix printed for use in the court of appeals. Petitioner states that Eastern's payment of $37,500 may represent what Eastern felt was properly owing, in addition to the compensation payment of over $17,000 by the United States (Pet., p. 11, fn. 3). More correct is petitioner's contrary suggestion that the United States had contributed to the $37,500 paid in settlement of the case by Eastern (see par. 2 of petitioner's Answer to the Petition of the United States of America to Enforce Lien, J.A. 22), which it did as part of the overall settlement with most of the representatives of those who died in the crash.

[4] Since there had been no conflicting claims to the remaining $20,334.50, that sum had been paid out earlier by order of the court (J.A. 20).

On appeal, the court below issued two opinions. The first opinion (Pet. App. B, pp. 13a–19a), in which the court reversed the judgment of the district court on a ground not specified as error by petitioner in the court of appeals and for that reason never briefed by the parties prior to appeal, was subsequently withdrawn by the court *sua sponte* (Pet. App. B, p. 19a).[5]

The second opinion (Pet. App. A, pp. 1a–12a), to which the petition for certiorari is directed, in effect affirmed the district court's ruling requiring reimbursement to the United States for its outlay of compensation under the Federal Employees' Compensation Act. Relying on this Court's opinion in *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 411–412, and on the specific language of Section 27 of the Compensation Act, the court below found nothing in the Act to suggest that the negligence of one Government employee which contributes to an accident to another Government employee might excuse a beneficiary from reimbursing the United States out of the money re-

[5] The first opinion was based on the theory that reimbursement under the Act was not allowable because petitioner had appeared, not in her capacity as widow (in which capacity she had been paid the compensation), but rather in her capacity as administratrix of her decedent's estate. The court reasoned that, since petitioner, as widow, never had a claim against Eastern, the Government had no valid claim for reimbursement from the funds established by Eastern. It suggested also that debts of the decedent's estate might exhaust the fund, so that petitioner, as widow, might ultimately recover none of it. The explicit terms of the Wrongful Death Act of the District of Columbia provide a full answer to this position (see footnote 7, *infra*).

ceived "in satisfaction of the liability of [an]other person" (Pet. App. A, p. 3a).[6] Accordingly, the court remanded the case for further proceedings to determine, *inter alia*, the widow's share of the fund.[7]

ARGUMENT

The decision below accords strictly with the language of the Federal Employees' Compensation Act and with the purposes of the Act as shown in its legislative history. The decision follows a similar ruling of this Court under comparable provisions of the Longshoremen's and Harbor Workers' Compensation Act, and its denial of double recovery to petitioner is in conflict with no decisions of any court, federal or state, under any compensation act. Since, then, the courts below have correctly interpreted Section 27 of the Act, and, since petitioner herself recog-

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[6] In his dissent (Pet. App. A, pp. 3a–12a), Judge Miller read the reimbursement provision of the Compensation Act as though it had been amended to be applicable when an injury or death "* * * is caused by the sole negligence of some person other than the United States" (Pet. App. A, p. 11a).

[7] The court observed that the wrongful death statute of the District of Columbia, under which the suit against Eastern was brought, expressly prohibited the expenditure, for any debts or liabilities of the decedent's estate, of any of the money recovered by an administrator in such an action (D.C. Code 16–1203), and specifically reserved the amount of recovery for distribution "to the spouse and next of kin * * *" (D.C. Code 16–1201) (Pet. App. A, p. 2a). The court thereupon held the reimbursement provisions of the Federal Employees' Compensation Act applicable to the money recovered from Eastern, but only to the extent that the reimbursement did "not exceed the widow's share of Eastern's payment" (Pet. App. A, p. 3a).

nizes that this case is entirely unique,* further review by this Court is unwarranted.

1. The decision of the court below that the United States is entitled to reimbursement of its compensation outlay is clearly required by the language of Sections 26 and 27 of the Compensation Act.

a. The primary impetus for passage of the Federal Employees' Compensation Act was the need for the elimination of negligence as a consideration with respect to the United States and its employees who were injured or killed in the course of their employment. The aim of the legislation was to provide a comprehensive system of "simple, certain, and uniform com-

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* In arguing in her reply brief in the court below (at pp. 8–9) that her position does not involve "destruction of the legislative policy against litigation of negligence", petitioner stressed heavily the uniqueness of this case's circumstances, saying:

> That previous determination [*i.e.*, the determination of negligence in the *Miller* cases (see footnote 2, *supra*)], which was rendered outside the realm of the Compensation Act, represents the truly *unique* aspect of this case, an aspect which is not likely to be repeated except in identical circumstances involving multiple deaths in a single accident where a test case as to the Government's negligence is prosecuted by someone other than a federal employee. To recognize the *unique* fact as to the Government's negligence in this instance is not to permit the question of negligence to be litigated in any manner or any forum differing from what occurred here. In short, we are dealing here with an acknowledged act of negligence rather than with an effort to litigate that question. [Emphasis added.]

The certiorari petition itself, in its statement that "[n]ever before has it been necessary to determine" the problem presented here, under an Act that is 45 years old, highlights the unusual nature of the case (Pet., p. 7).

pensation" for injuries, which would take the place of costly and wasteful litigation. *Johansen* v. *United States*, 343 U.S. 427, 440–441; *Patterson* v. *United States*, 359 U.S. 495.* Accordingly, a "sole statutory avenue to recover from the Government for tortious injuries received in Government employment" was established to provide compensation regardless of fault. *Johansen* v. *United States*, *supra*, 343 U.S. at 433.

The statutory scheme covering circumstances in which a third party tortfeasor may be liable for a compensable injury or death is a simple one. The Government may require the employee or his beneficiary to assign his cause of action against the third party to the Government, or it may require him to sue the third party. If the beneficiary refuses to assign or prosecute, he is not entitled to compensation. If he assigns, and the United States recovers

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* The legislative history of the Act makes clear that the proponents of the measure were determined to avoid any of the common law concepts of negligence, contributory negligence, assumption of the risk, and the fellow-servant rule. For proceedings in the House of Representatives, see 53 Cong. Rec. 10885–10976 (particularly the remarks of Mr. Sherley, p. 10896; Mr. Hamill, p. 10898; Mr. Borland, p. 10898; Mr. McKenzie, p. 10899; Mr. Cullop, p. 10903; and Mr. Keilly, p. 10904). For Senate proceedings, see 53 Cong. Rec. 12166, 12167, 12887–12902 (especially the remarks of Senator Husting, p. 12896, and Senator Hughes, p. 12889). The Senate and House Reports stressed the complete elimination of fault or negligence as a consideration under the Act, and the compelling need for certainty in payment for all accidents or injuries occurring during the course of employment, even though the level of payments might be relatively low. See S. Rep. No. 515, 64th Cong., 1st Sess., pp. 4, 7; H. Rep. No. 561, 63d Cong., 2d Sess., pp. 26, 27.

through suit or compromise, it retains the amount of compensation paid or payable, and, after deducting its costs, it must pay the surplus to the beneficiary. Section 26 of the Act, 5 U.S.C. 776, *supra*, pp. 3–4. Had this procedure been followed in the present case, and had the United States recovered $37,500 from Eastern, the United States would have paid to petitioner only the balance left after deduction of the compensation and the costs of collection.

The statutory scheme produces a similar result where the beneficiary sues or settles with the third party. The beneficiary is first permitted to deduct from his total recovery the costs of suit and a reasonable attorney's fee. He must then "apply the money * * * so received in the following manner: (A) If his compensation has been paid * * * he shall refund to the United States the amount of compensation which has been paid * * *." Section 27 of the Act, 5 U.S.C. 777, *supra*, p. 4. This language is stated in mandatory terms and makes no exception for negligence. Nor does it in any way limit the Government's right to reimbursement to those situations where a third party tortfeasor is solely liable for the injuries or death sustained by the federal employee.

b. Petitioner attempts to achieve a double recovery here by retention of the full recovery from Eastern, as well as the compensation outlay from the United States. Her contention that such double recovery is not precluded because the United States was negligent in effect requires that the language of the Act, "under circumstances creating a legal liability upon some person other than the United States to pay

damages therefor * * *," be read as if it had been amended to read, "under circumstances creating a legal liability *solely* in some person other than the United States * * *." See the dissenting opinion of Judge Miller quoted in footnote 6, *supra*. But the terms of the Act, as written by Congress, require reimbursement of the compensation outlay completely without regard to whether the United States might have been negligent.

Since fault or negligence is nowhere a consideration in the Act, the Government must make compensation payments in cases where it is not at all at fault, as recognized in the Senate Report on the bill which became law: "Perhaps one-half of the accidents occurring under the present complex industrial conditions is the result of fortuitous circumstances for which nobody is to blame." S. Rep. No. 515, 64th Cong., 1st Sess., p. 7. Congress did not try to provide a reward or windfall for unfortunate employees or their dependents, but merely sought to provide a floor below which their financial circumstances could not be depressed.[10] Thus, provision was made for reimbursement of the compensation payment whenever there was equivalent or greater recovery based upon "a legal liability upon some person other than the United States to pay damages therefor." Section 26 of the Act, 5 U.S.C. 776. In this fashion, the floor for payments was maintained, and a program was set up which would not be unduly costly to the

[10] The House committee evidenced concern that, if payment levels were too high, injured employees might thereby be induced to malinger. H. Rep. No. 561, 63d Cong., 2d Sess., p. 27.

United States, which is required to pay initially in every case regardless of fault."

c. Petitioner seeks now, on the basis of a unique circumstance, to undo the simple, certain, uniform, and litigation-free compensation scheme which operates completely regardless of fault, by making negligence a factor in the unambiguous reimbursement provisions of Sections 26 and 27 of the Act. Moreover, even though there was no adjudication of negligence on the part of the United States in the present case (see the Statement, *supra*, p. 5), petitioner would have this Court regard as "binding" on the United States certain determinations of negligence in other cases in which the United States was a party (see footnotes 2 and 8, *supra*), even though Section 201(b) of the Compensation Act (5 U.S.C. 757(b), *supra*, pp. 2–3) expressly precludes her from directly

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" Both the opinion of the dissenting judge (Pet. App. A, p. 11a) and the petitioner (Pet., p. 9) note the apparent incongruity of the result of the decision below which permits the United States "to free itself of all financial responsibility" when it is jointly negligent with a third party, whereas it is burdened with all of the financial responsibility when it is solely at fault. The example is incomplete, and ignores the fact that the United States must also pay when it is not at fault at all. The apparent incongruity would not arise if the Act's provisions were applied as Congress intended they should be, *i.e.*, *regardless of fault*. See *Dahn* v. *Davis*, 258 U.S. 421, 431, stating that comensation is "allowed wholly without regard to the negligence of the Government or its employees." Moreover, as the dissenting judge quickly notes by his suggestion that the funds should be returned to Eastern (Pet. App. A, p. 11a), the issue presented by these examples has more to do with possible questions of contribution or indemnity between Eastern and the United States, than with any question which petitioner can raise.

raising such an issue in judicial proceedings, and makes the terms of the Act her "exclusive" resource.

2. In *Dahn* v. *Davis*, 258 U.S. 421, 431, this Court, by stating that the aim of the Federal Employees' Compensation Act was to give compensation to Government employees who otherwise would be without remedy when injured by fault of the Government, thereby emphasized that cases covered by the Act might well involve the fault of the Government.

The Court further pointed out, however, that the Act was designed to compensate all employees injured in discharge of duty in an amount which was to be allowed wholly without regard to the negligence of the Government or its employees. The effect of the reimbursement provisions of Sections 26 and 27 of the Compensation Act was described by the Court in the following terms (258 U.S. at 430):

> Plainly, by these two sections Congress deals with the liability of persons *"other than the United States"* to employees entitled to compensation under the act, *not for the purpose of increasing that compensation, but for the purpose of reimbursing the Government for payments made* and of indemnifying it against other amounts payable in the future [second emphasis added].

In other cases, in which reimbursement provisions of similar compensation acts have been interpreted, no court has ever allowed the double recovery which petitioner here seeks.[12] Thus, under the Longshore-

[12] In fact, judicially determined negligence of an employer has been held irrelevant to the requirement for reimbursement under compensation statutes closely similar to the federal act.

men's and Harbor Workers' Compensation Act, a compensation act closely similar in operation to the one in the present case, this Court specifically rejected the allowance of double recovery where an employer's negligence contributed to an employee's injury. In *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, the injured employee, Hawn, sued the third-party tortfeasor, Pope & Talbot. The third party impleaded Hawn's employer, Haenn. The jury found that the third party was liable to the employee for negligence (as well as for the unseaworthiness of its ship), and that the employer had also been negligent. The district court entered judgment for the employee against Pope & Talbot, and the judgment was affirmed on appeal. The court also entered judgment for contribution against the employer in favor of the third party, but this judgment was reversed on appeal. This Court affirmed both of the circuit court's rulings against the third party.

In this Court, the third party, Pope & Talbot, contended, as does petitioner here, that the negligence of the employer barred the employer's recovery, through

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American District Telegraph Co. v. *Kittleson*, 179 F. 2d 946 (C.A. 8), (Iowa Workmen's Compensation Act); *Cyr* v. *F. S. Layne Co.*, 112 F. Supp. 526, 530–531 (D. Conn.) (Connecticut Workmen's Compensation Act). See also 2 Larson, *Workmen's Compensation Law*, Sections 71.00, 71.20, pp. 165–168. Larson states unequivocally that "it is not true in any jurisdiction having a third party statute that the employee may *keep* both recoveries" (*ibid.*, p. 167, fn.). When the question of permitting a double recovery came up in the hearings on the bill, and on the floor of the House, it was summarily rejected each time. Hearings on Federal Employees Compensation Before the House Committee on the Judiciary, 63d Cong., 2d Sess., Serial 16—Part 2, pp. 62–64; 53 Cong. Rec. 10910, 10912.

the employee, of the compensation outlay. The Court flatly rejected the contention (346 U.S. 411–412):

> Haenn has been making compensation payments to Hawn because of obligations imposed by the Longshoremen's and Harbor Workers' Compensation Act. 44 Stat. 1424, 33 U.S.C. § 901 *et seq.* Hawn has agreed to refund these payments to his employer out of his Pope & Talbot recovery. Pope & Talbot contends that the judgment against it should be reduced by this amount. It points out that Hawn's verdict includes sums for past loss of wages and medical expenses which it is argued were the very items on account of which Hawn's employer paid him. *Consequently Pope & Talbot says that if Hawn keeps the money he will have a double recovery and that to allow him to repay Haenn would give an unconscionable reward to an employer whose negligence contributed to the injury. A weakness in this ingenious argument is that § 33 of the Act has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injuries.* Pope & Talbot's contention if accepted would frustrate this purpose to protect employers who are subjected to absolute liability by the Act. Moreover, reduction of Pope & Talbot's liability at the expense of Haenn would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case. [Emphasis added.]

Section 27 of the Federal Employees' Compensation Act, has the same "specific provisions" as does Section 33 of the Longshoremen's and Harbor Workers'

Compensation Act (44 Stat. 1440, 33 U.S.C. 933) with respect to recoupment. Under both, the employee may retain the advantage of the potentially greater recovery obtainable by suit or settlement against a third party, so long as the basic compensation outlay is credited to the employer.[13] Moreover, they both call for reimbursement of the compensation outlay in almost identical language. The language in Section 27 of the Federal Employees' Compensation Act is—"under circumstances creating a legal liability in some person other than the United States to pay damages therefor * * *" (see *supra*, p. 4), and the language of Section 33 of the Longshoremen's and Harbor Workers' Compensation Act is—"that some person other than the employer is liable in damages * * *." Since the latter language in Section 33 of the Longshoremen's and Harbor Workers' Compensation Act was held not to stand in the way of reimbursement to the employer even though the third party tortfeasor was not solely liable, the comparable language in Section 27 of the Federal Employees' Compensation Act should also not be held to stand in the way of reimbursement to the United States.

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[13] Under the Longshoremen's Act, the Court has made clear that the reimbursement scheme entitles the employer to receive the beneficiary's share of a third party recovery to the extent that it effects reimbursement of the compensation outlay. *Doleman, Administrator* v. *Levine*, 295 U.S. 221; *Czaplicki* v. *The Hoogh Silvercloud*, 351 U.S. 525, 531–532.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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